

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

MELODY BYNUM,
Plaintiff,
vs.
MAPLEBEAR INC.,
d/b/a INSTACART,
Defendant.

) Civil Action
) No. 15-6263 (JBW)
) MOTION HEARING
) Brooklyn, New York
) Date: September 8, 2016
) Time: 11:00 a.m.
)
)

TRANSCRIPT OF MOTION HEARING

HELD BEFORE

THE HONORABLE JUDGE JACK B. WEINSTEIN
UNITED STATES DISTRICT JUDGE

APPENDICES

For the Plaintiff: Abdul Karim Hassan, Esq.

For the Defendant: Benjamin W. Berkowitz, Esq.
Alice K. Jump, Esq.

Also Present:

Melody Bynum, Plaintiff
Heather Wake, via telephonic communications
Rebecca Punak, via telephonic communications

Proceedings reported by machine shorthand, transcript produced by computer-aided transcription.

Court Reporter: Annette M. Montalvo, CSR, RDR, CRR
Official Court Reporter
United States Courthouse, Room N330
225 Cadman Plaza East
Brooklyn, New York 11201
718-804-2711

(WHEREUPON, commencing at 10:53 a.m., the following
proceedings were had in open court, to wit:)

3 THE COURTROOM DEPUTY: Civil cause for motion
4 hearing. *Bynum v. Maplebear Inc.* 15-CV-6263.

5 Counsel, note your appearances, please.

6 For the plaintiff?

7 MR. HASSAN: Your Honor, Mr. Abdul Hassan for
8 plaintiff, Ms. Bynum. Good morning. Plaintiff Ms. Bynum is
9 also present.

10 THE COURT: Good morning. Swear the plaintiff,
11 please.

12 THE COURTROOM DEPUTY: Please stand and raise your
13 right hand.

14 (WHEREUPON, the plaintiff was duly sworn.)

15 THE COURTROOM DEPUTY: State your name, please.

16 | THE WITNESS: Melanie Bynum.

17 | THE COURTROOM DEPUTY: Thank you.

18 For the defendant?

19 MR. BERKOWITZ: Good morning, Your Honor. Ben
20 Berkowitz of Keker & Van Nest here for the defendant,
21 Maplebear, doing business as Instacart.

22 MS. JUMP: Alice Jump, Reavis Parent Lehrer, local
23 counsel for the defendant.

24 | THE COURT: Good morning, everyone.

25 MR. BERKOWITZ: Your Honor, if I can add, we do have

1 a representative of the client available by telephone, as the
2 Court ordered, if the Court would like to dial them in.

3 THE COURT: Do you want to put them on?

4 THE COURTROOM DEPUTY: Sure.

5 MR. BERKOWITZ: Heather Wake. It's the same witness
6 who appeared in person last time, Your Honor.

7 (WHEREUPON, Ms. Wake and Ms. Punak entered the
8 proceedings via telephonic communications.)

9 MS. WAKE: Hello?

10 THE COURTROOM DEPUTY: Ms. Wake?

11 MS. WAKE: Yes, Ms. Wake here.

12 THE COURTROOM DEPUTY: All right. Judge Weinstein
13 is ready for the conference call.

14 Give your name, please.

15 MS. WAKE: Heather Wake.

16 THE COURTROOM DEPUTY: Spell your last name.

17 MS. WAKE: W-a-k-e.

18 THE COURTROOM DEPUTY: Okay.

19 MR. BERKOWITZ: Your Honor, I believe Rebecca Punak,
20 who is in-house counsel for Instacart, is also on the line.

21 THE COURT: Swear the defendant representative,
22 please. What's her name?

23 MR. BERKOWITZ: The representative is Heather Wake,
24 which is W-a-k-e. And I believe she's accompanied by one of
25 Instacart's in-house attorneys, who is Rebecca Punak,

1 P-u-n-a-k.

2 (WHEREUPON, Ms. Wake was duly sworn.)

3 THE COURT: All right. We have a mandate from the
4 Court of Appeals, July 13, 2016. The appeal was dismissed,
5 and that appeal, I take it, was from this February order,
6 correct?

7 MR. HASSAN: Yes, Your Honor. February 12.

8 THE COURT: Yes. And then the Court of Appeals said
9 it is not final, so you can't appeal it, it is interlocutory.
10 And it made the following suggestion: The district court
11 should determine in the first instance whether the appellant's
12 waiver of the right to arbitrate entitles the appellant to
13 terminate the existing stay of dismissal, or, two, whether
14 certification under 28 USC Section 1292(b) is appropriate.
15 And that's the certification by the district court allowing an
16 interlocutory order to go up, again, subject to the Court of
17 Appeals taking the matter. And that's all they do. So they
18 dismissed it and made a few suggestions.

19 I don't know what you mean by, speaking for the
20 plaintiff, by you're waiving the right to arbitration. Could
21 you explain that to me?

22 MR. HASSAN: Very simply, Your Honor. The plaintiff
23 made a decision that she does not want to arbitrate because we
24 still believe there's significant risk involved in
25 arbitration, so the next step in the case would have been

1 arbitration, and in the absence of that next step, there's
2 nothing else to do in the court.

3 THE COURT: Madam, is that what you want to do, you
4 want to waive your right to arbitration?

5 PLAINTIFF BYNUM: That is correct, yes.

6 THE COURT: On the advice of counsel?

7 PLAINTIFF BYNUM: That is correct.

8 THE COURT: Do you know that that will lead to
9 dismissal of your case on the merits, which means you can't
10 bring the case again; do you understand that?

11 PLAINTIFF BYNUM: I do, yes. It was explained.

12 THE COURT: And you advised her of that?

13 MR. HASSAN: Yes, Your Honor. We went through this
14 in great detail.

15 THE COURT: So when you say you're waiving
16 arbitration, I take it you mean you refuse to go to
17 arbitration; is that right?

18 PLAINTIFF BYNUM: That is correct, yes.

19 THE COURT: I see no other basis than to dismiss the
20 case.

21 MR. BERKOWITZ: Your Honor, if we could be heard on
22 that?

23 THE COURT: On the merits, yes.

24 MR. BERKOWITZ: On the question of whether the case
25 should be dismissed?

1 THE COURT: Yes.

2 MR. BERKOWITZ: Well, Your Honor, I think, really,
3 the Second Circuit's decision in *Katz* speaks to the issue of
4 whether a district court has the discretion to dismiss a case
5 rather than -- once a stay has been entered under section 3.
6 So section 3, as the Court knows and as the Court described in
7 its opinion, requires a mandatory stay by the district court.
8 The Second Circuit in *Katz* has interpreted that mandatory
9 language quite strictly. So in *Katz* --

10 THE COURT: So I've issued a stay. That's where we
11 are.

12 MR. BERKOWITZ: Exactly.

13 THE COURT: I followed the court. But I have issued
14 the stay so that you could proceed to arbitration in the case.
15 You intended to proceed to arbitration; is that correct?

16 MR. BERKOWITZ: That's correct, Your Honor. We have
17 filed an arbitration.

18 THE COURT: You actually filed an arbitration.

19 MR. BERKOWITZ: That's correct.

20 THE COURT: Okay. Give me a letter to that effect,
21 to the filing.

22 MR. BERKOWITZ: Yes, Your Honor.

23 THE COURT: And so what do you want to do now? They
24 refuse to go to arbitration.

25 MR. BERKOWITZ: It seems to us, Your Honor, that the

1 arbitration ought to be, you know, decided on the merits.
2 Whether that's decided because of, you know, failure to
3 prosecute or otherwise, that's really a decision for the
4 arbitrator. In other words, the case has now been -- the case
5 has now been compelled to arbitration by this court. You
6 know, jurisdiction over any final decision on the merits of
7 this case is in front of JAMS, and when -- if Ms. Bynum, you
8 know, decides to fail to prosecute the case in JAMS, as she --

9 THE COURT: As she already told me she decided that.

10 MR. BERKOWITZ: As she says she may do. The
11 decision of how it --

12 THE COURT: She didn't say "may." She said she does
13 now do.

14 MR. BERKOWITZ: It seems to me that that is an issue
15 that ought to be, you know, addressed in the first instance by
16 JAMS, by the arbitrator.

17 THE COURT: I don't understand what they have to
18 address. You have moved for arbitration; she refuses to go
19 ahead. The arbitrator can't do anything on your motion
20 without her being present.

21 MR. BERKOWITZ: Well, I think an arbitrator, just as
22 if a litigant refuses --

23 THE COURT: What would the arbitrator be able to do?

24 MR. BERKOWITZ: Just --

25 THE COURT: You come in and say, "I want to

1 arbitrate this dispute." She says, "I have no form of a
2 dispute." Right? "I don't want to arbitrate."

3 Isn't that your position?

4 PLAINTIFF BYNUM: Correct, it is.

5 MR. BERKOWITZ: I think it is -- I don't think it is
6 any -- I don't think it is any different than if we were in a
7 court, Your Honor. If the plaintiff in a court refused to
8 proceed with the litigation, there would be a dismissal
9 entered on that basis. I think the same result will occur in
10 arbitration.

11 THE COURT: But I know that's what the result is.
12 Why put us through a further delay and perhaps require the
13 plaintiff to spend money and time on this?

14 MR. BERKOWITZ: Well, I think, Your Honor, I think
15 the different -- I think the difference -- I mean, I think it
16 goes down to what is considered, you know, a final judgment
17 under the FAA.

18 THE COURT: Well, if I dismiss it, then it is final.

19 MR. BERKOWITZ: I think -- well, I guess my comment
20 on that would be under the *Katz* decision, Your Honor, I don't
21 believe -- I don't believe the Court has the discretion to
22 dismiss the case under *Katz*.

23 THE COURT: Maybe that's what we ought to have the
24 Court of Appeals tell us. It seems to me a waste of arbitral
25 resources, court resources, and the plaintiff's resources, to

1 allow the arbitrator to do what the arbitrator has to do,
2 dismiss.

3 MR. BERKOWITZ: If I could speak to that efficiency
4 issue. There is a reason why I think this process is intended
5 to work this way.

6 THE COURT: Why?

7 MR. BERKOWITZ: Under -- you know, one of the
8 reasons Congress passed the FAA was to permit parties by
9 contract to agree to speedier, faster, more efficient form of
10 litigation. By permitting effectively an interlocutory appeal
11 here, with not -- and keep in mind the plaintiff isn't waiving
12 her right to arbitrate --

13 THE COURT: It is not interlocutory. It is a final
14 dismissal of the action on the merits. The defendant is not
15 going to move to re-open because I am not -- isn't that right?

16 PLAINTIFF BYNUM: Correct.

17 MR. HASSAN: True, Your Honor. If we lose the
18 appeal, our claims are gone.

19 THE COURT: The appeal?

20 MR. HASSAN: If after you dismiss and we appeal, if
21 we lose that appeal, it is gone, we are out of luck.

22 MR. BERKOWITZ: So the argument for efficiency under
23 the FAA is this case can be resolved fairly quickly in
24 arbitration. If Ms. Bynum goes to arbitration and prevails --

25 THE COURT: She is withdrawing her claim in this

1 case. In effect, she's moving to dismiss this case; is that
2 right?

3 MR. HASSAN: That's the effect, Your Honor, because
4 under *Slayton* you can decline further action, which
5 automatically converts the stay into a dismissal.

6 THE COURT: She's refusing to go forward with this
7 case.

8 MR. BERKOWITZ: I think that --

9 THE COURT: Why should I retain jurisdiction when
10 the plaintiff's doesn't want to go forward? And when the
11 plaintiff understands it is going to be a dismissal on the
12 merits?

13 MR. BERKOWITZ: I think the difference between -- so
14 recognizing, I think, the difference between *Slayton*, *Slayton*
15 involves a decision -- did involve a decision on the merits.
16 It involved the dismissal of the claims, admittedly, with
17 leave to amend, and the party then declined to amend, which
18 did result in a final decision on the merits.

19 There's a distinction in -- as described in the
20 *Green Tree* case, US Supreme Court case, *Green Tree*, with
21 respect to a final decision on the merits -- with a final
22 decision for purposes of arbitration, and what the Supreme
23 Court says in *Green Tree* is that a -- where a stay has been
24 entered under section 3 as opposed to dismissal, that isn't a
25 final decision for purposes of arbitration.

1 THE COURT: A stay.

2 MR. BERKOWITZ: And what *Katz* says in the Second
3 Circuit is that a stay is mandatory, and that the district
4 court doesn't have discretion to dismiss. And it is -- the
5 way that *Katz* -- the procedural posture of *Katz*, of course, is
6 on -- it was the cross -- on the cross-appeal from Verizon,
7 who was appealing the denial of its request to stay
8 proceedings.

9 And so it seems to us there are different appellate
10 rights -- I mean, there's an efficiency to having the case
11 fully litigated on the merits in the arbitral forum before
12 proceeding to appeal. Now, that full litigation on the merits
13 may involve, as Ms. Bynum has said she's doing, a declination
14 or failure to prosecute, which will be part of the merits
15 appeal, but it doesn't strike us that you can conditionally
16 waive your right to proceed in a case.

17 In other words, unlike *Slayton*, unlike *Slayton* and
18 unlike cases involving -- other cases in the circuit that
19 involve decisions on the merits, here there's a decision
20 that's not on the merits of the claim and that's completely
21 conditional in terms of the dismissal. So it is conditional
22 only with respect to --

23 THE COURT: Not the position on the merits. She
24 says, "I don't want to go forward with my claim at all, I am
25 withdrawing."

1 I mean, it's a basic principal, it seems to me, of
2 procedure. Subject to such things as class actions, that the
3 plaintiff controls her case. If she said -- we have them
4 every day. I get a letter saying, plaintiff withdraws the
5 case. Dismissed on the merits. That goes on all the time.
6 They may withdraw it because they are settling or because they
7 are tired or exhausted or whatever.

8 MR. BERKOWITZ: That does happen, Your Honor. I
9 think the difference here is that the withdrawal is
10 conditional in a way that section 16 of the FAA --

11 THE COURT: In what way is it conditional?

12 MR. BERKOWITZ: She's saying I'm only withdrawing my
13 claims if the court -- first of all, if the court certifies
14 the appeal -- not certifies the appeal, but permits the appeal
15 under --

16 THE COURT: I can't permit any appeal. I will not
17 certify this case because it is clear to me that a
18 certification will not expedite decision in the case. And the
19 Court of Appeals is not going to -- even if I were to certify
20 it -- is certainly not going to accept the certification. So
21 a certification is denied.

22 So then we have a plaintiff who says "I don't want
23 to go forward with my case," for whatever reason. That should
24 be the end of it.

25 MR. BERKOWITZ: Well, in the typical case,

1 Your Honor --

2 THE COURT: The arbitrator has not been appointed.

3 MR. BERKOWITZ: That's correct.

4 MR. HASSAN: The arbitration even hasn't begun.

5 They are waiting for Ms. Bynum to pay them money, and she's
6 not paying them any money.

7 THE COURT: She's told me she doesn't want to go
8 forward with that case here or before the arbitration, right?

9 MR. HASSAN: She would like to go forward with the
10 case here, but in light of the arbitration order, she can't.

11 THE COURT: I see. Okay.

12 MR. BERKOWITZ: And that's what I mean by Your Honor
13 being conditional. In other words, in a typical case, Your
14 Honor, a litigant has to litigate their case or dismiss it.
15 They don't get to conditionally dismiss it, particularly when
16 it comes to cases involving issues like FAA or issues like
17 class certification and so on. And in the Second Circuit, we
18 do think the *Katz* decision -- in other words, Ms. Bynum is
19 entitled to dismiss her case. What she's not entitled to do
20 under section 16 of the FAA is to manufacture finality for
21 purposes of arbitration.

22 THE COURT: The only thing that worries me about a
23 dismissal on the merits is whether this attorney has acted
24 ethically, I don't say you haven't, by putting the client's
25 possible claim at risk for a decision on the merits, and

1 whether, as an ethical and as a procedural question, this
2 practice should be permitted. But the client is sitting right
3 here next to him and she says -- you don't want to go forward
4 with the case, right?

5 PLAINTIFF BYNUM: Correct. Yes.

6 MR. HASSAN: Your Honor, let me address that, since
7 you addressed it to me specifically.

8 This Court made a decision on arbitration, and we
9 don't even know what rules would apply in arbitration. We
10 don't even know if this Court's striking of the fee shifting
11 is final. They, I am sure, are going to argue at some later
12 point that that decision --

13 THE COURT: That would all come up when I get a
14 final arbitrator's award.

15 MR. HASSAN: No, the decision to review it, your
16 ability to review is restricted. That's one of the points
17 we're making.

18 THE COURT: Well, that's the nature of the --

19 MR. HASSAN: It is to trap the plaintiff in
20 arbitration, and the plaintiff is facing a situation where for
21 \$3,000, she can potentially be facing liability, 10, 15, 20
22 times that. You have to be insane to do that. And I told the
23 plaintiff, if I were her, I would never do it. It doesn't
24 make any sense.

25 THE COURT: Look. I don't know what your ethical

1 position is and whether you are going through this procedural
2 posture that we now have before us in order to get a ruling
3 from the Court of Appeals on what's happened here. I know you
4 specialize in these cases, as I understand.

5 MR. HASSAN: Yes, Your Honor. We don't want a
6 ruling --

7 THE COURT: Excuse me.

8 You have exactly the same situation in the Southern
9 District, there's a remand.

10 MR. HASSAN: Yes, Your Honor.

11 THE COURT: What's happened in that case?

12 MR. HASSAN: We haven't yet taken any action. We
13 are going to file a motion.

14 THE COURT: To what?

15 MR. HASSAN: To do the same thing, to certify -- or
16 to dismiss in that case.

17 THE COURT: Same as here?

18 MR. HASSAN: Yes. Her coworker. Her coworker is in
19 the Southern District.

20 THE COURT: She'll be in the same position that the
21 plaintiff is in here.

22 MR. HASSAN: Yes. And if we get to that case, we
23 might put that case on hold. We have two other cases in which
24 we were not waiving -- I haven't advised the clients to waive
25 arbitration because the amount in controversy is very

1 significant.

2 So we're hoping that there could be some
3 certification. But if there's any objective view of the
4 arbitration in this case, the provisions, you'll have to
5 commit malpractice to advise someone to risk \$3,000 so they
6 can pay \$100,000. That is absolutely nonsense.

7 MR. BERKOWITZ: Your Honor --

8 MR. HASSAN: And let me say, Your Honor, we didn't
9 ask for this fight. We filed a case here. This case could
10 have been over already. Instead, we have a motion we had
11 to -- we couldn't go to arbitration because this Court agreed
12 with us that a fee splitting provision was unconscionable.
13 You also agreed with us that a venue position was horrible.

14 So we have every justification for not only filing
15 it here, but for opposing the motion. Then there is something
16 unhealthy that happens in arbitration cases, where the judge
17 gets together with the defendant --

18 THE COURT: Excuse me. I think what I have here is
19 an attorney that wants to use this case to establish a general
20 proposition in like cases that he has. I am not interested in
21 that.

22 MR. HASSAN: I don't want that. Let us proceed in
23 court. I'll give it up.

24 THE COURT: You'll do what?

25 MR. HASSAN: Your Honor, let us proceed in court.

1 We don't want any appeals. We would like to proceed in court.

2 THE COURT: You can't proceed in court because you
3 must arbitrate.

4 MR. HASSAN: But it is not a fact, Your Honor. We
5 respect the Court's decision, but don't blame us for having to
6 appeal when we didn't give the order -- we didn't file a
7 motion, we didn't make the order. I mean, I like the fact
8 that we're going to appeal it, but we have a right to do that.

9 THE COURT: I see. You want to stop your case; is
10 that right, Madam?

11 PLAINTIFF BYNUM: For arbitration, yes.

12 THE COURT: And for all purposes now, if you take
13 that position, I am going to dismiss it on the merits.

14 PLAINTIFF BYNUM: Correct.

15 THE COURT: And then we'll have the Court of Appeals
16 decide whether a dismissal on the merits is appropriate, where
17 one of the parties says "I have been ordered to go to
18 arbitration, but I prefer to withdraw my case." That's your
19 position.

20 MR. HASSAN: Yes, Your Honor. It is the only
21 logical, sensible position.

22 THE COURT: Okay. Stop.

23 So I am going to dismiss it on the merits, that is,
24 as I understand it, a final order, but the Court of Appeals
25 decides that, not the district court. And you can take an

1 appeal if you wish. You understand that you've -- are you
2 seeking an appeal?

3 PLAINTIFF BYNUM: Are we seeking an appeal? Yes.

4 THE COURT: From my order of dismissal on the
5 merits?

6 PLAINTIFF BYNUM: That's correct, yes.

7 THE COURT: You are?

8 MR. HASSAN: Yes, Your Honor.

9 THE COURT: Okay. So all this procedure is designed
10 to permit you to take an appeal from the order of arbitration.

11 MR. HASSAN: So that we are not forced into
12 arbitration at great financial risk to the plaintiff.

13 THE COURT: For whatever reason.

14 MR. HASSAN: We would like to proceed in court, if
15 you like.

16 THE COURT: I understand.

17 I am going to dismiss. Either one of you can take
18 it up on appeal, and we will get a ruling on whether you can
19 do this and what the district court should do under these
20 circumstances. My view is that the easiest and best thing to
21 do is to cut the knot, dismiss on the merits, and end the
22 dispute, without involving a major arbitral association, JAMS
23 or AAA or any others, without involving courts in a further
24 litigation after the arbitration, whatever it may be, with or
25 without the plaintiff. And in my opinion, without burdening

1 the Court of Appeals. I will issue an opinion dismissing on
2 the merits.

3 MR. HASSAN: Thank you, Your Honor.

4 MR. BERKOWITZ: We understand, Your Honor.

5 THE COURT: Okay. It would be interesting to listen
6 to this argument on appeal.

7 MR. BERKOWITZ: I'm sorry?

8 THE COURT: It would be interesting to listen to
9 this argument on appeal. Thank you.

10 MR. HASSAN: Thank you.

11 MS. JUMP: Thank you.

12 MR. BERKOWITZ: Thank you.

13 THE COURT: The defendant will order a copy of the
14 minutes and supply a copy to plaintiff and the court.

15 MR. BERKOWITZ: Yes, Your Honor.

16 THE COURT: Immediate copy.

17 MR. BERKOWITZ: Thank you, Your Honor.

18 (Proceedings concluded at 11:19 a.m.)

19 * * * * *

20 **REPORTER'S CERTIFICATE**

21 I, ANNETTE M. MONTALVO, do hereby certify that the
22 above and foregoing constitutes a true and accurate transcript
23 of my stenographic notes and is a full, true and complete
transcript of the proceedings to the best of my ability.

24 /s/Annette M. Montalvo

25 Annette M. Montalvo, CSR, RDR, CRR, Official Court Reporter

Dated 9/14/2016